

RAYMOND G. ROSENLUND

IBLA 85-464

Decided November 21, 1986

Appeal from a decision of Administrative Law Judge Michael L. Morehouse denying claim of ownership of unbranded horses. Nevada 4-81-01.

Affirmed.

1. Evidence: Sufficiency--Wild Free-Roaming Horses and Burros Act

A person claiming ownership of wild free-roaming horses on the public lands must present evidence of ownership to the authorized officer who may issue authorization for a roundup, specifying a reasonable time to effect gathering of the animals claimed. The criterion as to reasonable time is met where BLM has recognized a claim for 5 years and has granted four extensions during that period to effect gathering. Where the successor in interest to the original claimant presented a claim to an uncertain number of progeny, remote by several generations from the animals of the original claim, BLM properly refused to recognize such claim.

APPEARANCES: Raymond G. Rosenlund, pro se; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Raymond G. Rosenlund has appealed from a decision dated February 7, 1985, by Administrative Law Judge Michael L. Morehouse, denying his claim of ownership of unbranded horses on Buck Mountain, Bald Mountain, Newark Valley, Long Valley, Ruby Valley, and the Maverick Range, Nevada.

Appellant is the son-in-law of Art Cook and the successor in interest of Cook's claims to ownership of the horses. On January 21, 1974, Cook filed a claim for 95 branded horses. On August 15, 1974, he filed an additional claim for 142 unbranded horses, which he described as the "increase" from branded mares and studs (Exhs. G-2, G-4). On February 27, 1974, BLM issued an authorization to gather horses based on the first claim, and, at a roundup

on July 28, 1974, accepted the supplemental claim for 142 horses, listed as the progeny of the horses on the first claim (Exh. G-3, G-5). By letter dated February 3, 1976, the Acting District Manager (BLM's Ely District Office), allowed Cook an extension to March 31, 1976, to gather the horses claimed. The letter noted that an extension could not be granted between April 1 and June 30, 1976, "due to the potential for abortion or abandonment of foals by the mares." The letter further noted that Cook had gathered 60 of the 142 horses claimed and that he was authorized to gather the remaining 82 horses (Exh. G-13). In a further extension, granted to February 28, 1977, BLM corrected its figures, noting that Cook was authorized to gather an additional 177 horses (the total originally claimed, less the 60 already gathered (Exh. G-14)). As of June 13, 1977, BLM records showed that Cook had 152 horses remaining to be gathered. On that date BLM issued a further extension, from June 16 through September 30, 1977, to effect the gathering (Exh. G-21). On September 27, 1977, 120 horses remained to be gathered. BLM allowed until February 28, 1978, to gather these animals (Exh. G-36). By letter dated December 5, 1977, the Acting Forest Supervisor, Humboldt National Forest, wrote Cook as follows:

As per our discussion in my office this morning, you are authorized to trap another 21 head of horses (this includes colts) which would result in removing a total of 120 head of claimed horses from the Cherry Springs Wild Horse Territory. The BLM has established a final date of 2/28/78 for exercising BLM horse claims and we are authorizing you to trap until that date. Since you are operating under a BLM claim, if they should move the date back we would have to do so also.

(Exh. G-54). By letter dated April 24, 1979, BLM allowed Cook to gather his branded horses (the number was not specified) "this year" subject to the following conditions:

1. Use of a helicopter will be permitted this fall under these conditions:
 - a.) You must post the necessary money to contract the helicopter.
 - b.) The entire operation will be conducted by Bureau personnel as per Title 43 CFR 4730.7-2 and 4740.4. A copy of which are enclosed for your information.
2. Summer water trapping will not be allowed as it has been in the past, due to the lack of manpower to supervise such operations on a daily basis.
3. All unbranded horses except nursing foals on a branded mare or yearlings following a branded mare will be released. We will not recognize any claim for unbranded horses other than those mentioned above.

(Exh. G-39).

On February 27-28, a branded horse inventory was conducted on the Buck/Bald wild horse area. The results disclosed 951 wild horses and 108 Cook-brand horses (Exh. G-40). On August 12, 1980, Cook was informed that a wild horse gathering would take place in the Buck, Bald, and Maverick Springs areas in cooperation with the State of Nevada (Exh. G-41). The roundup occurred between August 25 and September 5, 1980.

A September 5, 1980, examination by Nevada State inspectors and BLM personnel revealed that of 100 horses originally thought to be strays, 49 were Cook-brand horses and there were an additional 20 colts. Sometime thereafter, Cook apparently filed a request to gather 300 horses. This request was denied by BLM letter dated October 4, 1982, as follows:

At your request I have carefully reviewed both the information you gave me plus that found in your horse claiming file. Your request to gather an additional 300 horses stems from two claims, one filed in January 1974 and the other filed in August 1974.

From February 1974 through February 1978, you were granted four extensions for gathering claimed horses, three times was because you complained of poor weather and rough country. In addition, you have not, in the last 4-1/2 years, requested any further extensions of time.

I am sure you would have to agree that, if someone was serious about gathering claimed horses, four years is more than ample time to gather 237 horses or that person would have requested additional extensions the past 4-1/2 years. I see no reason to grant your request to gather an additional 300 horses from a claim nearly nine years old and hereby notify you that your 1974 horse claims are no longer recognized.

(Exh. G-45).

Appellant Raymond Rosenlund was introduced into this matter through his attorney, who, by letter to BLM dated February 11, 1983, indicated he wished to make a claim, on behalf of Rosenlund, for "1087 head of horses that originally belonged to Art Cook which Raymond has now purchased" (Exh. G-46). On March 7, 1983, appellant filed a further claim for 1,344 horses, which he described as an amendment to Cook's 1974 claim, to cover the originally claimed horses and their progeny (Exh. G-48). On March 21, 1983, appellant submitted a further "amended" claim for 1,003 horses (Exh. G-49).

On July 21, 1983, the District Manager issued a proposed decision on the Rosenlund claims. He denied these claims for the stated reasons that Cook had a reasonable time to gather the horses identified in his claims, that BLM considered the Cook claims filled and satisfied, and that the

unbranded 1/ horses presently occupying the lands in question were regarded as wild and free-roaming animals. 2/ The decision indicated appellant would be given authority to gather branded animals under 43 CFR 4720.2(a) 3/ if he provided BLM with a complete description of the animals claimed, a complete record of sightings, including dates and locations, as well as other information. Appellant protested and the District Manager issued a final decision on October 21, 1983, which stated:

I have reconsidered my proposed decision of July 14, 1983 (as corrected on August 23, 1983) concerning your claim of ownership of horses. In light of information you presented at the protest meeting, it is my decision to deny your claim(s) of ownership of unbranded horses on Buck Mountain, Bald Mountain, Newark Valley, Long Valley, Ruby Valley, and the Maverick Range for the reasons that:

1) You have not presented any additional information that would show my proposed decision to be in error.

1/ The District Manager's proposed decision erroneously used the word "branded." On Aug. 23, 1983, he issued a correction noting the word should have been "unbranded" (Exh. G-53).

2/ 43 CFR 4700.0-5(b) defines "wild free-roaming horses and burros" as

"all unbranded and unclaimed horses and burros and their progeny that have used public lands on or after December 15, 1971, or that do use these lands as all or part of their habitat, including those animals given an identifying mark upon capture for live disposal by the authorized officer."

3/ This regulation provides:

"§ 4720.2 Claimed animals.

"(a) Any person claiming ownership under State branding and estray laws of unbranded or branded horses or burros on public land where such animals are not authorized must present evidence of ownership to justify a roundup before permission will be granted to gather such animals. Claims of ownership with supporting evidence were required to be filed during a 90-day claiming period which expired November 15, 1973. Unauthorized privately owned horses or burros entering onto the public lands after November 15, 1973, may be claimed by filing an application with the District Manager. All written authorizations to gather claimed animals shall be on a form approved by the Director and shall provide for compliance with appropriate provisions of Subpart 4720. After such public notice as the authorized officer deems appropriate to inform interested parties, he may authorize the gathering or roundup. The authorized officer shall provide in the authorization that the gathering or roundup shall be consistent with these regulations; shall establish in the authorization a reasonable period of time to allow the gathering of the claimed animals; and shall provide such other conditions in the authorization which he deems necessary to minimize stress on any associated wild free-roaming horses or burros and to protect other resources."

2) Claims of ownership with supporting evidence were required to be filed during a 90 day claiming period which expired November 15, 1973 and authorization to gather claimed horses was terminated February 28, 1978. [4/]

3) The animals were on public land on or before November 15, 1973, thus all unbranded horses and their progeny are considered under Public Law 92-195 to be wild and free-roaming.

You could be given an authorization to gather the branded animals identified in your claim in accordance with 43 CFR 4720.2(a).

On June 26, 1984, a hearing was held before Administrative Law Judge Michael L. Morehouse in Ely, Nevada. At the hearing, appellant's counsel stated that the present claim was for 1,087 horses, the progeny of the 120 claimed horses that had not been gathered as of September 27, 1977. 5/ Counsel further asserted that the Cooks gathered no horses after that date because the BLM would not allow it (Tr. 12-13).

BLM's position was that all 237 horses claimed in 1974 had been gathered and that the claims were satisfied (Tr. 83). BLM's evidence in this regard is based in part on brand inspection certificates documenting roundup activity during August and September 1980 (Exh. G-44). Area Manager Howard Hedrick testified that of the 100 animals rounded up in 1980 49 branded horses were counted against Cook's claim, that Cook refused these horses because he had sold them, and that the 49 horses satisfied all of Cook's claim (Tr. 79-83).

BLM range conservationist Milton Frei testified that a foal or yearling can be identified because it will be following its mother. As to any horse more than a year or two of age, it would not be possible to identify the heritage of that horse, and it would be impossible to determine the heritage of a 13-year old horse (Tr. 27-28).

Sandy Rosenlund, Cook's daughter, testified that she was familiar with her father's claim, that not all of the horses claimed were gathered, and that an estimated 600 progeny of the claimed horses are on the range (Tr. 140). She indicated she could identify progeny of seed stock of the ranch, and that people knowledgeable of horses could identify the heritage of horses, but thought there was no objective way of making such identifications (Tr. 142-45).

4/ Notice that the authorization terminated Feb. 28, 1978, was communicated to Cook by letter dated Mar. 3, 1978 (Exh. G-6). However, BLM allowed Cook to gather branded horses in 1979 (Exh. G-39).

5/ As of that date, BLM's records showed 120 horses left to be gathered. See Exhibit G-36.

The Judge found based on the December 5, 1977, letter of the Acting Forest Supervisor (Exh. G-54, quoted supra) that by that date, Cook had already removed 99 of the 120 horses which remained to be gathered as of the previous September, and that he was authorized to remove 21 more. The Judge further found that it could not be determined from the record whether these 21 horses were gathered, nor how many horses remained to be gathered from the original claim. The Judge concluded that appellant had failed to meet his burden of showing the District Manager's decision to be either arbitrary or unreasonable, that appellant was afforded ample opportunity to gather claimed horses and that the claims, as transferred from Cook to appellant herein, had become too undefined and nebulous to be recognizable.

In the statement of reasons, appellant asserts that Judge Morehouse incorrectly found Cook filed a claim for 142 branded horses in July 1974, when in fact the claim was for unbranded horses only. 6/ Appellant argues that other ranchers in the same claiming area were allowed to gather their claimed horses and progeny, that the 21 horses authorized for gathering in December 1977 (Exh. G-54) were never gathered, and that Cook would have gathered all horses, had he had the use of a helicopter, but that using "the means he did have" he was unable to keep "ahead of the increase." Appellant also asserts that in refusing to recognize his claim, the Government is "stealing private property with no just cause."

[1] Section 5 of the Act of December 15, 1971, as amended, 16 U.S.C. § 1335 (1982) (the Act), provides that any person claiming ownership of a horse or burro on the public lands may recover it only if recovery is consistent with the branding and stray laws of the state in which the animal is found. The gathering of horses requires written authorization and the claimant must present evidence of ownership to the authorized officer. 43 CFR 4720.1, 4720.2(a). In American Horse Protection v. U.S. Department of the Interior, 551 F.2d 432, 441 (D.C. Cir. 1977), the court stated as follows with respect to the regulations:

The final regulations published in August, 1973, after the roundup in this case, make the responsibility for the final decision on animal ownership very clear. The regulations require the claimant to first present some substantial indicium of ownership to the authorized federal officer. After a roundup, the federal officer and a state official must together inspect the animal, and the state official then makes a written determination of ownership pursuant to the state's branding and estray laws and any cooperative agreement between the Bureau and the state agency. A copy of the determination is to be filed with the federal officer and, as the regulations explicate, "[n]o animal may be removed from the gathering place until the claim of ownership

6/ Appellant is correct. See Tr. 21, 32; Exhibits G-4, G-5. We do not, however, find that this error had a direct bearing on the result reached by Judge Morehouse.

has been proven to the satisfaction of the authorized officer." [Footnotes omitted; emphasis supplied.]

See also Sheridan v. Andrus, 465 F. Supp. 662 (D.C. Colo. 1979).

43 CFR 4720.2(a) also specifies that the authorized officer shall establish a reasonable period of time to allow the gathering of the animals claimed. That criterion was generously met in the case before us. BLM recognized the claims between 1974 and 1979, granting four extensions of time in which to gather horses during that period. BLM's documentation as to activities such as roundups and brand inspections appears reliable and credible. Moreover, the record offers no basis for appellant's allegation that he or his predecessor was ever prohibited or prevented by BLM from gathering horses until the claims were first formally denied in writing in 1982. Though invited by BLM to do so, neither appellant nor his predecessor filed specific indicia of ownership for the animals claimed. Under these circumstances, we find, as did the Judge, that the District Manager's decision denying the claim was reasonable and in harmony with the Act and regulations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Bruce R. Harris
Administrative Judge

